IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO NO.11 of 2004

DATE OF DECISION:November 1, 2006

M/s. ION Exchange India Ltd.

….Appellant

VERSUS

M/s Satpal Singh Grover

…..Respondents

CORAM:- HON'BLE MR. JUSTICE VINEY MITTAL

PRESENT: Shri V.K.Jain, Senior Advocate with
Shri Prashant, Advocate for the appellant.
Shri Arun Jain, Advocate for the respondent.

Viney Mittal,J.

The defendant company is the appellant before this Court. It has challenged the order dated December 22, 2003 passed by the learned Additional District Judge, Faridabad, whereby on an appeal filed by it, the judgment and decree of the trial Court have been set aside and the matter has been remanded back to the trial Court but the Appellate Court has directed that the defendant company will not be entitled to file any written statement and will not be entitled to cross-examine the plaintiff's witnesses but such cross examination will be limited to pointing out the weakness of the plaintiff's case but such a cross examination would not travel beyond to disclose any defence.

The facts which emerge from the record show that the plaintiff firm M/s Satpal Singh Grover, a sole proprietorship of Satpal Singh Grover, filed a suit for mandatory injunction on January 4,

2002 for directing the defendant M/s ION Exchange India Limited (the present appellant company) to pay outstanding amount of Rs.26,59,221/- alongwith interest pendente-lite and future interest, in accordance with the terms and conditions of the contract alleged to have been entered into between the parties. Although an alternative prayer for a decree for recovery of the aforesaid amount was made but the plaintiff firm did not choose to pay court fee qua the suit for recovery. As a matter of fact, the court fee was paid only for the relief of mandatory injunction. Various facts on the basis of which the claim was made by the plaintiff firm need not be noticed, at this stage at all, inasmuch as, upon notice of the suit having been issued, the defendant put in appearance before the trial Court on March 27, 2002. On the aforesaid date, the defendant company maintained that the copy of the plaint had not been received by it. It also sought time to file written statement. Consequently, the trial Court adjourned the proceedings in the suit for filing the written statement to various dates. It appears from the record that ultimately the matter remained pending for filing the written statement upto May 30,2003. No written statement, however, was filed by the defendant company.

On May 29,2003, the defendant company chose to file an application under Order 7 Rule 11 of the Code of Civil Procedure for rejection of the plaint. The said application was filed with a plea that since no court fee had been paid by the plaintiff firm for the relief of recovery of the amount and only a prayer had been made for grant of a decree of mandatory injunction, therefore, the suit filed by the plaintiff firm was not maintainable and the plaint was liable to be rejected.

The aforesaid application filed by the defendant company was contested by the plaintiff firm. Vide an order dated July 28, 2003, the trial Court held that the suit for mandatory injunction filed by the plaintiff firm was not maintainable and on account of the relief for recovery of the aforesaid amount, the trial Court directed the plaintiff firm to pay the requisite court fee within one month.

It further appears from the record that in the meantime, an application was also filed by the plaintiff firm for striking off the defence of the defendant company on the ground that no written statement had been filed by the defendant company in spite of repeated adjournments sought and granted in this regard. In the aforesaid application filed by the plaintiff firm, the following order was passed by the learned trial Judge on August 18, 2003:

"Present: Sh.M.C.Sharma, proxy counsel for the plaintiff.

Mrs. Anju Bhushan, Advocate for defendant.

It is mentioned by the defendant counsel that in compliance of the order dated 28.7.2003 ad valorem court fees has yet not been fixed. Therefore, let the application of the plaintiff be replied & considered after the depositing of the court fees only for which the time has yet not been expired. Keeping in view the said submission the matter is adjourned to 6.11.2003 for filing the reply & consideration. Therefore, with respect to the application of the plaintiff.

Rachna Gupta,
CJJD/Faridabad
18.8.2003.

At this stage the counsel for the plaintiff Sh.B.Gosain has come present with the ad valorem court fee court fees to be affixed on the plaint. In furtherance of the order dated 28.7.2003, the said court fees is affixed on record. At this stage, the said counsel has opposed the adjournment on the ground that despite the suit was instituted on Jan 2002 till date no written statement has been filed by the defendant rather they are seeking adjournment on one pretext or the other. Despite that the objection of the court fees has also been taken vide the written statement they had opted for filing an application under Order 7 Rule 11 and even after the same has been disposed off, they again have sought an adjournment without even waiting for the plaintiff to come forward in compliance of order, as the adjournment is too long to meet the ends of the justice and the plaintiff is suffering for the malafide tactics of the defendant. Even otherwise, the application of the plaintiff does not require any reply because the same is purely legal in nature and it is the court only who has to appreciate and adjudicate the merits thereof. In view of the said submission the counsel Mr.M.C.Sharma was also called upon who despite calling has not come present in the court. Keeping in view that Vakalatnama on behalf of the defendant is fixed by Ms.Anju Bhushan and

Mr.M.C.Sharma, proxy counsel for the plaintiff & further keeping in view of the above said submission of the plaintiff, a court notice to be issued to the defendant and his counsel is deemed is justified. At this stage, the plaintiff has requested to get the court notice to be served by him, dasti in addition. Same is allowed. Now to come upon 2.9.2003 for execution of the said court notice and thereafter consideration.

Rachna Gupta,
CJJD/Faridabad
18.8.2003."

A perusal of the aforesaid order dated August 18, 2003 passed by the trial Judge shows that since the plaintiff firm had been directed to pay the ad valorem court fee within a period of one month and the aforesaid period had not yet expired, therefore, originally the order was passed by the trial Court at the first instance, adjourning the proceedings in the application of the plaintiff firm for striking off the defence of the defendant company to November 6, 2003. However, on the same date, immediately after the pronouncement of the order by the trial Judge, the plaintiff firm paid the ad valorem court fee.

Immediately on the payment of court fee, the application filed by the plaintiff firm for striking off the defence of the defendant company was taken up for consideration and it was observed by the trial Court that since the suit had been instituted by the plaintiff firm in January 2002 and till date no written statement had been filed, therefore, the trial Court observed that application of the plaintiff

firm did not require any reply by the defendant company. Consequently, the proceedings were adjourned to September 2, 2003 for execution of the court notice and for further consideration. It further appears from the record that on September 2, 2003, the application filed by the plaintiff firm for pronouncement of the judgment against the defendant company was heard. The case was adjourned to September 6, 2003 for orders. It also appears from the record that the trial Court decreed the suit filed by the plaintiff on September 10,2003, thereby treating the defence of the defendant company as struck off and consequently pronounced the orders.

The defendant company filed an appeal against the judgment and decree of the trial Court. It challenged the procedure adopted by the trial Court and claimed that since the court fee had been paid by the plaintiff on August 18, 2003 for the first time, therefore the defendant company had a right to file a written statement and contest the suit on merits. It also questioned the procedure adopted by the trial Court in pronouncing the judgment without requiring the plaintiff firm to prove the facts, stated in the plaint.

The First Appellate Court accepted the objection raised by the defendant company to the limited extent that the plaintiff was required to prove its case but observed that in view of the provisions of Order 8 Rule 1 of the Code of Civil Procedure, as amended with effect from July 1, 2002, the written statement having not been filed by the defendant company within a period of 90 days, no written statement could be permitted to be filed subsequently. Consequently, the appellate Court allowed the appeal filed by the defendant

company to the limited extent that the matter was remanded back to the trial Court for fresh decision but the defendant company was held not entitled to file any written statement and not entitled to cross examine the plaintiff's witnesses and not permitted to lead its own evidence. The appeal filed by the defendant company was allowed by the Appellate Court with the following directions:

> "In view of the foregoing discussion and circumstances enumerated above, the impugned judgment and decree is set aside and the appeal stands allowed to the extent indicated below:
>
> i) the defendant will not be entitled to file any written statement.;
>
> ii) the defendant will be entitled to cross examine the plaintiff's witnesses but such cross examination will be limited to pointing out the fallacies or weakness of the plaintiff's case but under no circumstance would the cross examination be permitted by the trial court to travel beyond this legitimate scope and to convert itself virtually into a presentation of the defendant's case either currently or in the form of suggestions put to the plaintiff's witnesses.
>
> iii) The defendant would be permitted to address arguments to point out weakness of the plaintiff's case."

It is in these circumstances that the defendant company has approached this Court through the present appeal.

I have heard Shri V.K.Jain, the learned senior counsel appearing for the defendant company and Shri Arun Jain, the learned counsel appearing for the plaintiff firm and with their assistance have also gone through the record of the case.

Shri V.K.Jain, the learned senior counsel appearing for the defendant company has very vehemently argued that although the plaint in question was presented by the plaintiff firm before the trial Court on January 4, 2002 but the relief sought in the said plaint was for passing of a decree of mandatory injunction for directing the defendant company to pay an outstanding amount of Rs.26,59,221/- alongwith interest pendente-lite and future interest. The learned counsel also points out that although a prayer for recovery of the aforesaid amount was also made but no court fee for the aforesaid relief was affixed by the plaintiff firm. The learned senior counsel further points out that in these circumstances, although the proceedings were adjourned by the trial Court for about a period of one year for filing the written statement on behalf of the defendant company but on May 29,2003, an application was filed by the defendant company under Order 7 Rule 11 of the Code of the Civil Procedure for rejection of the said plaint on the ground that the suit filed by the plaintiff firm was not maintainable, having not been affixed with the requisite court fee. The learned senior counsel, thus, maintains that when the aforesaid application of the defendant company was allowed by the trial Court on July 28, 2003, thereafter the court fee was paid by the plaintiff firm only on August 18, 2003

and it was only thereafter that the suit filed by the plaintiff firm could be treated to be a duly constituted suit. The learned senior counsel has argued that in these circumstances the pronouncement of the judgment by the trial Judge in the absence of the written statement filed by the defendant company and without affording any opportunity to the defendant company to file the written statement after the affixation of the court fee was wholly an error on the part of the trial Judge. The learned senior counsel thus maintains that the Appellate Court, having noticed all the aforesaid facts, has also committed an error in law when it has remanded the case back to the trial Court after setting aside the judgment and decree but has restricted the participation of the defendant company and has held it not entitled to file any written statement.

On the other hand, Shri Arun Jain, the learned counsel appearing for the plaintiff firm has with equal vehemence argued that the suit had been filed by the plaintiff firm on January 4, 2002 and when the defendant company had put in appearance on March 27, 2002, then for a period of more than one year, in spite of repeated adjournments sought and having been granted by the trial Court, the defendant company chose not to file any written statement. Shri Jain has, thus, argued that the aforesaid default committed by the defendant company had been duly taken note of by the trial Court as well as by the Appellate Court and in these circumstances the defendant company was not entitled to file the written statement or to participate in the proceedings to raise any defences of its own.

I have duly considered the rival contentions of the learned counsel for the parties.

In my considered opinion, the present appeal must succeed.

The detailed facts have been noticed above. It has also been noticed that although after the appearance of the defendant company on March 27, 2002, the matter remained pending for a period of approximately one year for filing written statement by the defendant company and no such written statement was filed on May 29, 2003, the defendant company filed an application under Order 7 Rule 11 of the Code of Civil Procedure. A specific objection was raised with regard to non-fixation of ad valorem court fee by the plaintiff firm. A prayer was made for rejection of the plaint. The said application was even contested by the plaintiff firm. However, vide order dated July 28, 2003, the said application was allowed by the trial Judge. It was held that the court fee affixed on the suit by the plaintiff firm was inadequate. It was further held that the suit for mandatory injunction filed by the plaintiff firm was not maintainable and keeping in view the alternative prayer for recovery of the amount, the plaintiff firm was required to affix the ad valorem court fee within one month of the passing of the said order. In the meantime, the plaintiff firm had also filed an application for striking off the defence of the defendant company and pronouncement of the judgment. When the aforesaid application filed by the plaintiff firm came up for consideration before the trial Court on August 18, 2003, it was noticed by the trial Judge that the period for affixation of the court fee granted to the plaintiff firm had not expired as yet and that till that time the requisite court fee had not been paid. In these circumstances, the proceedings in the application filed by the plaintiff firm were

adjourned to November 6, 2003. However, on the aforesaid date itself, immediately after the pronouncement of the order by the trial Court, the plaintiff firm affixed the requisite court fee. In these circumstances, after the affixation of court fee, the application filed by the plaintiff firm was taken up for consideration and the trial Court observed that defendant company was delaying the proceedings on one pretext or the other. Consequently, the proceedings in the suit were adjourned to September 2, 2003 for consideration of the application filed by the plaintiff firm (an order dated August 18, 2003 passed by the trial Court has already been extracted above).

On September 2, 2003, the trial Court heard the arguments on the application of the plaintiff firm and it appears that on September 10,2003 decreed the suit of the plaintiff firm and pronounced the judgment. The course adopted by the trial Judge cannot be held to be in accordance with the well established procedure, nor it can be treated to be fair in any manner. The trial Judge completely ignored that the suit filed by the plaintiff firm was merely for a mandatory injunction to start with. The requisite court fee for mandatory injunction had been affixed. Although an alternative relief for recovery of the amount in question had also been mad but no court fee had been affixed qua the said relief. It is true that the defendant company had been seeking repeated adjournments for filing the written statement but on May 29,2003 when application was filed by the defendant company under Order 7 Rule 11 of the Code of Civil Procedure, the said application was also allowed by the trial Court on July 28, 2003. The plaintiff firm was directed to affix the requisite ad valorem court fee with regard to the relief of recovery

of amount within a period of one month. In these circumstances, when the defendant company had justifiably explained that the plaint presented by the plaintiff firm on January 4, 2002 was without the affixation of the requisite court fee and the aforesaid court fee had been paid for the first time on August 18, 2003, then the defendant company had a legitimate right to raise all defences which are available to it for opposing the prayer of the relief of recovery of the amount in question by filing a detailed written statement. The aforesaid opportunity has been denied to the defendant company. The trial Court in hot haste chose to deny the fair defence to the defendant company and chose to pronounce the judgment straightway on the claim made by the plaintiff firm and decreed the suit.

The aforesaid judgment and decree of the trial Court were legitimately challenged by the defendant company by filing an appeal before the First Appellate Court. The Appellate Court, although noticed all the detailed facts, but was still influenced by the fact that for a period of more than one year, the defendant company had defaulted by not filing any written statement. In these circumstances, although the Appellate Court held that the judgment and decree of the trial Court could not be legally sustained but keeping in view the fact that written statement had not been filed by the defendant company within 90 days, restrictions to the defence of the suit, as noticed above, were put on the defendant company. In my considered opinion, the course adopted by the First Appellate Court cannot be legally sustained. The learned Appellate Court has completely ignored the conduct of the plaintiff firm. It has completely lost sight of the fact that the plaint presented by the

plaintiff firm on January 4, 2002 was not even legally maintainable, as per the order dated July 28, 2003, passed by the trial Court itself. Rather than commenting upon the misconduct of the plaintiff firm, the defendant company had been treated to be a defaulter.

Even otherwise, in view of the law laid down by the Apex Court in Salem Advocate Bar Association, T.N. v. Union of India 2005(6) SCC 344, the provisions of Order 8 Rule 1 of the Code of Civil Procedure are merely directory in nature and cannot be treated to be mandatory. It has been held that even after the expiry of the outer limit of 90 days, specified in the aforesaid provision, the defendant may be permitted to file a written statement. However, in the present case, the facts and circumstances of the case wholly justify such a permission being granted to the defendant company.

Before parting with this judgment, it may also be noticed that the trial Court had decreed a suit by the plaintiff firm merely on the basis of averments contained in the plaint and without there being any proof of the correctness of the same. No evidence whatsoever was led by the plaintiff firm to prove the facts as stated in the plaint. The plaintiff firm was, as a matter of fact, permitted by the trial Court to take advantage of its own clever device, inasmuch as, the plaint was presented on January 4, 2002 merely asking for a decree of mandatory injunction for payment of a huge amount of Rs.26,59,221/- alongwith interest and future interest. No court fee was affixed on the said suit claiming the recovery of the amount. Such a suit on the face of it was not even maintainable. The trial Court ignored the said fact. On an objection having been raised through application under Order 7 Rule 11 of the Code of Civil

Procedure filed by the defendant company, the said fact was noticed by the trial Judge. The said application was allowed. The plaintiff firm was directed to affix the court fee within one month. It is apparent that in the meantime, the plaintiff firm filed an application for pronouncement of the judgment and striking off the defence of the defendant company. No court fee was paid even at that point of time. When the matter was taken up on August 18, 2003, the trial Judge noticed the aforesaid fact. It adjourned the proceedings to November 6, 2003 at the first instance. After the passing of the said order, the plaintiff firm affixed the court fee on the same day. It is, thus, apparent that the plaintiff firm was playing a hide and seek with the Courts and was trying to misuse the process of law to secure undue advantage against the defendant company. It appears that the trial Court also unwittingly feel for the mechanism of the plaintiff firm when it pronounced the judgment by striking off the defence of the defendant company. The aforesaid proceedings taken up by the trial Judge cannot be legally sustained, in any manner. The Appellate Court has also failed to notice the aforesaid misconduct of the plaintiff firm.

For the aforesaid reasons, the present appeal is allowed. The order of the learned Additional District Judge dated December 22, 2003 passed in the appeal of the defendant company is set aside to the extent that, whereas, the judgment and decree of the trial Court would remain set aside and the matter would be proceeded afresh before the trial Court for further proceedings in accordance with law. The defendant company would be entitled to file a written statement by raising all such pleas, as are available to it and thereafter shall be

entitled to participate in the proceedings, in accordance with law, by cross examining the witnesses of the plaintiff firm and also to lead its own evidence.

The parties through their learned counsel have been directed to appear before the trial Court on December 11, 2006.

A copy of this order be given dasti on payment of charges for urgent copies.

November 1, 2006 (Viney Mittal)
KD Judge

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M/s Satpal Singh Grover

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PRESENT:

HON'BLE MR. JUSTICE VINEY MITTAL

Shri V.K.Jain, Senior Advocate with
Shri Prashant, Advocate for the appellant.
Shri Arun Jain, Advocate for the respondent.

To be referred to the reporter or not? Yes.